CLERK'S COPY

CERTIFICATE.

Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930

No. ~~914~~ 131

G. E. HERRON

vs.

SOUTHERN PACIFIC COMPANY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED MAY 20, 1930

(35,045)

(35,045)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 21, 1930

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 5948

G. E. Herron, Appellant,

vs.

Southern Pacific Company, a Corporation, Appellee

Appeal from the United States District Court for the District of Arizona

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, under Sectio. 239 of the Judicial Code—Filed Mar. 3, 1930

Statement of Facts

This was an action to recover damages for personal injuries resulting from a collision between an automobile driven by the plaintiff and a freight train operated by the defendant. Seventh Avenue, in Phoenix, Arizona, where the accident occurred, runs north and south, and is intersected by two tracks used by the defendant, running east and west. At the time of receiving the injuries complained of, the plaintiff was driving north along Seventh Avenue, at about midnight, returning from a dance hall, accompanied by a companion. As they approached the railroad crossing, they were preceded by another automobile. At, or near, the intersection, the automobile ahead turned to the right and passed around the end of a freight train, which completely blocked the crossing. The plaintiff testified that he did not see the train until he had approached within about ten feet of it, and that he then applied his brakes, but without avail. He crashed into the train, wrecking his automobile and causing serious injury to himself. At the close [fol. 2] of the testimony on the part of the plaintiff, the court directed a verdict in favor of the defendant, and from the judgment on the verdict the plaintiff has appealed.

The verdict in favor of the defendant was directed in the court below because of the contributory negligence of the plaintiff. If the court below was at liberty to follow the settled rule in the courts of the United States, that whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court (Barrett v. Virginian Ry. Co., 250 U. S. 473-6), the ruling of the court below in directing the verdict was justified and free from error. But section 5 of article 18 of the constitution of the state of Arizona provides: "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury." If the above constitutional provision was controlling upon the court below, sitting in that state, the direction of a verdict for the defendant because of the contributory negligence of the plaintiff was error.

QUESTIONS CERTIFIED

Therefore, for a proper decision of the above entitled cause, now pending on appeal and duly submitted for consideration, instructions are respectfully requested of the Supreme Court on the following important and controlling question of law, concerning which we are in doubt, viz:

First. Is the above provision of the constitution of the state of Arizona binding and controlling upon a federal court sitting in that state? Or, putting the question in another form:

Second. May a federal court sitting in the state of Arizona [fols. 3 & 4] direct a verdict for the defendant in an action to recover damages for personal injuries, when it appears as a matter of law that the plaintiff was guilty of contributory negligence, notwithstanding the state constitutional provision to the contrary?

Dated March 3, 1930.

Frank H. Rudkin, Frank S. Dietrich, Curtis D. Wilbur, U. S. Circuit Judges, Ninth Circuit.

[File endorsement omitted.]

A true copy. Attest March 3, 1930.
Paul P. O'Brien, Clerk. (Seal United States Circuit Court of Appeals, Ninth Circuit.)

Endorsed on cover: File No. 35,045. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 914. G. E. Herron, vs. Southern Pacific Company. (Certificate.) Filed May 20, 1930. File No. 35,045.

(4109)